



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 11, 2004

Mr. Noble D. Walker, Jr.  
Assistant City Attorney, Greenville, Texas  
Scott, Walker & Bench  
P. O. Box 1353  
Greenville, Texas 75403-1353

OR2004-6794

Dear Mr. Walker:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207038.

The Greenville Police Department (the "department"), which you represent, received a request for information pertaining to an investigation of the alleged sexual assault of two specified individuals. You claim that some of the requested information is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the information that you submitted to us for review as Exhibit B includes a search warrant affidavit. An affidavit to support a search warrant is made public by statute if the search warrant has been executed. *See* Code Crim. Proc. art. 18.01(b). It appears from our review of Exhibit B that the search warrant associated with this affidavit has been executed. Accordingly, we conclude that the department must release the search warrant affidavit that we have marked pursuant to article 18.01(b) of the Code of Criminal Procedure.

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<sup>1</sup> Although the department claims that some of the requested information is excepted from disclosure under section 552.108 of the Government Code, we note that the department has not submitted comments to us stating the reasons why it believes that section 552.108 is applicable in this instance. Accordingly, we conclude that the department has waived this particular exception to disclosure with regard to the information at issue. *See* Gov't Code §§ 552.301, .302.

Next, we note that Exhibit B contains medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. When a patient is deceased medical records may be released only on the signed consent of the deceased's personal representative. *See id.* §§ 159.005(a)(5). The consent in that instance must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). We have marked the medical records in Exhibit B that are subject to the MPA. The department may only disclose these records in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the department must withhold these records pursuant to the MPA.

You claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the constitutional and common-law rights to privacy.<sup>2</sup> We note that the constitutional right to privacy encompasses two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 455 at 4 (1987). The first type of constitutional privacy protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *See id.* The scope of information protected by constitutional privacy is narrower than that under the doctrine of common-law privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the constitutional and common-law rights to privacy.

Information is protected from disclosure by the common-law right to privacy if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. See *Industrial Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. See *id.* at 683. In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. See Open Records Decision No. 393 (1983). However, in this instance, the requestor knows the identities of the alleged sexual assault victims who are portrayed in the submitted information. Thus, we believe that withholding only the alleged victims' identifying information from the requestor in this instance would not preserve their common-law privacy interests. Accordingly, we conclude that the department must withhold the information that we have marked and that is associated with offense report number 9040062 pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You state that the victim who is associated with offense report number 9030858 is "possibly deceased." In this regard, we note that the right of privacy is purely personal and lapses at death. See *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.-Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM- 229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). But see Attorney General Opinion JM-229 (1984) (if release of information about deceased person reveals highly intimate or embarrassing information about living persons, that information must be withheld under common-law privacy). Thus, if the victim associated with offense report number 9030858 was alive on the date that the department received this request for information, we conclude that the department must withhold the remaining submitted information that we have marked and that is associated with offense report number 9030858 pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. If, however, the victim associated with offense report number 9030858 was deceased on the date that the department received this request for information, we conclude that the department may not withhold any portion of the remaining submitted information associated with offense report number 9030858 under section 552.101 of the Government Code in conjunction with either the constitutional or common-law rights to privacy on the basis of any privacy interests that the deceased may have had in the information.

Nevertheless, you assert that if the victim associated with offense report number 9030858 was deceased on the date that the department received this request, that portions of the information associated with offense report number 9030858 must be withheld under section 552.101 of the Government Code on the basis of privacy interests that may be

asserted by family members of the deceased victim. In this regard, we note that the United States Supreme Court recently recognized that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). Based on our review of the remaining submitted information associated with offense report number 9030858, we find that although portions of this information arguably contain highly intimate facts, the publication of which would be highly objectionable to a reasonable person, the information relates solely to a possibly deceased individual and does not reveal highly intimate or embarrassing facts about a living individual. Accordingly, we conclude the department may not withhold any portion of the remaining submitted information associated with offense report number 9030858 under section 552.101 of the Government Code on the basis of constitutional or common-law privacy interests that may be asserted by family members of the deceased victim.

In the event that the victim associated with offense report number 9030858 was deceased on the date that the department received this request for information, we address your remaining claims. You claim that a portion of the remaining submitted information associated with offense report number 9030858 is excepted from disclosure pursuant to section 552.101 in conjunction with regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See HIPAA*, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Public Information Act (the "Act"). *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We, therefore, held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See* Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure

under the Act, the department may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

You also raise section 552.101 in conjunction with sections 411.083 and 411.084 of the Government Code. Criminal history record information ("CHRI") is confidential and not subject to disclosure. CHRI "means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions" but does not include "driving record information maintained by [the Department of Public Safety ("DPS")] under Subchapter C, Chapter 521, Transportation Code." Gov't Code § 411.082(2). Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. Gov't Code §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. Gov't Code § 411.084; *see also* Gov't Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies).

We note that section 411.083 does not distinguish between the CHRI of a person who is living and one who is deceased. Furthermore, we do not believe that section 411.083 is intended solely to protect the privacy interest of the subject individual. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (maintenance of criminal history record information essential for investigation of crime). Accordingly, we conclude that to the extent that the department maintains CHRI that is within the ambit of these state and federal regulations, the department must withhold such CHRI pursuant to section 552.101 of the Government Code as information made confidential by law.

In summary, the department must release the search warrant affidavit that we have marked pursuant to article 18.01(b) of the Code of Criminal Procedure. Absent the applicability of an MPA access provision, the department must withhold the medical records that we have marked pursuant to the MPA. The department must withhold the information that we have marked and that is associated with offense report number 9040062 pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. If the victim associated with offense report number 9030858 was alive on the date that the department received this request for information, the department must withhold the remaining submitted information that we have marked and that is associated with offense report number 9030858 pursuant to section 552.101 in conjunction with the common-law right to privacy. If the victim associated with offense report number 9030858 was deceased

on the date that the department received this request for information, then the department must withhold any CHRI that it maintains under chapter 411 of the Government Code pursuant to section 552.101 as information made confidential by law. In the event that the victim associated with offense report number 9030858 was deceased on the date that the department received this request for information, the department must release to the requestor the remaining submitted information associated with offense report number 9030858.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

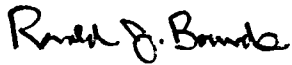
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/jev

Ref: ID# 207038

Enc. Marked documents

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